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No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1935

NORMAN W. BINGHAM, JR., ET AL. EXECUTORS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 61–64) is reported in 7 F. Supp. 907. The majority and dissenting opinions in the Circuit Court of Appeals (R. 83–91) are reported in 76 F. (2d) 573.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1935. (R. 91.) The petition

for a writ of certiorari was filed May 29, 1935, and was granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain life-insurance policies may be included in the insured's gross estate.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

STATEMENT

King Upton died on February 27, 1921. (R. 7.) During his lifetime he had taken out various policies of insurance on his own life. This case involves the propriety of including the proceeds of

five[1] of such policies in his gross estate under the Revenue Act of 1918. All five were taken out before the effective date of that Act, and the premiums thereon were paid by the decedent out of his individual funds, from the time of their issuance up to the time of his death. (R. 8, 9.)

Four of the policies were issued by the Berkshire Life Insurance Company, and were originally payable to the decedent's executors, administrators, or assigns. (R. 11, 17, 23, 29.) Three of those four policies contained provision for cash surrender. (R. 19, 25, 31.) On July 25, 1904, the decedent assigned his interest in all four of the Berkshire policies to his wife subject to the condition that she survive him. The instrument of assignment read (R. 35):

> In consideration of love, affection, and one dollar I do hereby assign all my right, title and interest in policies number 35,098, 41,714, 47,954, and 47,955 issued by the BERKSHIRE LIFE INSURANCE COMPANY OF PITTSFIELD, MASS., insuring the life of King Upton of Salem, Mass., and all additions to said policy, whether now or hereafter apportioned, (reserving and excepting the right to the assured to apply the cash value of any

[1] The proceedings in the District Court and the Circuit Court of Appeals involved seven policies. Two of them, issued by the Manhattan Life Insurance Company (R. 9), were excluded from the decedent's gross estate by the Circuit Court of Appeals. The Government has not petitioned for review as to those two policies.

dividends or additions thereon in payment of premiums hereafter due on said policy) unto my wife, Annie D. Upton, *provided she survives me.* This assignment is made subject to a previous assignment[2] to the Berkshire Life Ins. Co. dated June 30, 1904.

Dated at Boston, Mass. this 25th day of July, A. D. 1904.

[SEAL] (Signed) KING UPTON.

In presence of—

(Signed) THOS. COURTIS.

(Italics supplied.)

The fifth policy, issued by the Connecticut Mutual Life Insurance Company of Hartford, named the insured's wife as beneficiary, with provision that if she should predecease him, the proceeds would be payable to his children, or in default thereof to his legal representatives. (R. 43.) The policy further provided that at the end of ten years from its date (May 22, 1883), or at the end of each five years thereafter, the company *would pay the cash value to the insured* upon surrender of the policy within thirty days after the end of each such period. (R. 43.)

The District Court held that none of the proceeds might be included in the decedent's gross estate, but its judgment was reversed by the Circuit Court of Appeals.

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[2] The previous assignment referred to was as security for a loan, which was outstanding in the amount of $5,900 at the time of the insured's death. However, the Government is seeking to include in the gross estate only such proceeds as exceeded the amount of that loan. (R. 9.)

SUMMARY OF ARGUMENT

1. Section 402 (f) of the 1918 Act is broad and all-inclusive. It requires that policies of insurance taken out by a decedent on his own life shall be included in his gross estate to the extent that the proceeds exceed $40,000 where they are receivable by beneficiaries other than his executors. The statute makes no requirement as to when the policies must be taken out. In *Lewellyn* v. *Frick, infra,* however, this Court decided that certain policies taken out before the effective date of the 1918 Act could not be included chiefly because the statute should be construed as referring only to transactions taking place after it was passed.

But as applied to the policies herein the statute does not have any retroactive operation, and they are therefore not within the scope of the *Frick* decision. This Court has evinced a general tendency to determine retroactivity not by the date when the policies were taken out, but rather by the interests which passed or were rendered indefeasible at death. The *Frick* case does not stand for the proposition that *every* policy taken out before the 1918 Act is exempt from the operation of Section 402 (f). That decision applies only where the statute would operate retroactively.

In this case the wife's interest in the four Berkshire policies was wholly contingent upon survivorship. In the Connecticut policy her rights were similarly incomplete, as well as being subject to the

control of the insured at the end of each five-year period. In all five policies, it was the death of the insured that rendered her rights indefeasible for the first time. But that event occurred after the effective date of the 1918 Act. Accordingly, we submit that the statute would not have any retroactive operation, and is therefore applicable.

2. As so construed, the statute is constitutional. It is appropriate to include the proceeds of these policies in the measure of the insured's gross estate, not only because life insurance is *per se* testamentary and may be assimilated to property passing at death, but also because the contingent character of the beneficiary's rights rendered them incomplete until the insured's death.

ARGUMENT

I

SECTION 402 (F) OF THE 1918 ACT REQUIRES THE INCLUSION OF THESE INSURANCE POLICIES IN THE DECEDENT'S GROSS ESTATE

A

THE ISSUE IS NOT FORECLOSED BY LEWELLYN v. FRICK. WHETHER SECTION 402 (F) OPERATES RETROACTIVELY MUST BE CONSIDERED SEPARATELY IN EVERY CASE

Section 402 (f) of the 1918 Act states that the value of a decedent's estate shall be determined by including therein "the excess over $40,000[4] of the

[4] The $40,000 exemption has been allowed by the Commissioner, and no question is raised in respect thereof. (R. 8.)

amount receivable by all other [other than executor] beneficiaries as insurance under policies taken out by the decedent upon his own life". The language would seem broad and all-inclusive.

An exception, however, was read into that language by this Court in *Lewellyn* v. *Frick,* 268 U. S. 238, namely, that the statute is inapplicable where its operation would be retroactive in effect. It therefore excluded from a decedent's estate eleven policies taken out before the effective date of the 1918 Act.

It is our position, however, that *Lewellyn* v. *Frick* does not prevent the inclusion of *every* policy taken out before the enactment of the 1918 Act. In certain cases the statute would not have a retroactive effect because of reserved powers in the insured or because of contingencies involved in a beneficiary's interests which became indefeasible only upon the insured's death after the passage of the statute. And in such cases where there would in fact be no retroactive operation of the statute we believe that the all-inclusive language of Section 402 (f) is not subject to the exception read into it by the *Frick* decision.

Thus, in *Heiner* v. *Grandin,* 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), the decedent had taken out a policy in 1894 and another in 1906, reserving in both of them the power to change the beneficiary. His death in 1920 raised the question as to whether those policies were subject to the provisions of Sec-

tion 402 (f) of the 1918 Act. The Circuit Court of Appeals held that since the statute had no retroactive effect as to those policies they were not subject to the limitations imposed upon Section 402 (f) by the *Frick* case. Had this Court intended the *Frick* decision to stand for the proposition that *every* policy taken out before the 1918 Act could not be included under Section 402 (f), the decision in *Heiner* v. *Grandin* would have been in square conflict with the *Frick* decision. Yet this Court denied certiorari in the *Grandin* case (286 U. S. 561).

While the denial of certiorari may not be considered as an adjudication upon the merits, we think that it may have some significance. Thus, where the petition for certiorari alleges a conflict with an earlier decision of this Court, the holding of which may be subject to two interpretations, one in square conflict with the decision seeking review, and the other distinguishable, it is reasonable to infer that in denying certiorari, the Court regarded its earlier decision as not being in conflict with the decision below.[4] Such reasoning in no way seeks to employ the denial of certiorari as an indication of what this Court thought of the merits of the later case. Whether the Court felt the later de-

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[4] Cf. *Taylor-Wharton Iron & Steel Co.* v. *Commissioner*, 74 F. (2d) 300, 301 (C. C. A. 3d):

"The action of the Supreme Court in denying certiorari in these two cases, 290 U. S. 670, 677, while not officially significant, inclines us to the belief that the two courts properly understood the law of the *Woolford Realty Co.* case and that this court is correctly applying it now."

cision of the lower court right or wrong, it is a fair assumption that it did not consider its own earlier decision inconsistent with the later one. Thus it is reasonable to assume that in denying certiorari in the *Grandin* case, this Court did not understand the *Frick* case as excluding from Section 402 (f) *all* policies taken out before the 1918 Act. And we submit that whether the *Frick* case applies must be determined in each instance by considering whether the statute would in fact operate retroactively.

That the scope of the *Frick* decision is not as broad as the petitioners herein assert is further evidenced by this Court's combined treatment of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and *Chase National Bank* v. *United States*, 278 U. S. 327. In the *Chase National Bank* case the decedent had taken out three policies after the enactment of the 1921 Act reserving the power to change beneficiaries, and died while that statute was still in effect. The Court held that Section 402 (f) of the 1921 Act (identical with the corresponding provisions of the 1918 Act) was applicable. Since the policies were taken out after the effective date of the Act, that decision, if it stood alone, might not have any significance with reference to the present issue. But the Court on that same day decided *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, holding, *inter alia*, that two trusts, created in 1903 and 1910 respectively, revocable by the settlor, were properly included in the gross estate of the settlor

under the 1921 Act. In reaching that result, the Court relied upon its decision in the *Chase National Bank* case (p. 345):

> * * * in *Chase National Bank* v. *United States,* decided this day, *ante,* p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States, supra,* we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

Thus, the Court employed the *Chase National Bank* case to justify a holding that it was not retroactive taxation to include in a decedent's gross estate transfers made by him before the effective date of any Federal estate tax statute, but which became complete only at his death. The inference is plain, that had the policies in the *Chase National Bank* case been taken out before the first Federal estate tax statute (or before either the 1918 or 1921 Acts), it would not have been retroactive taxation to include them in the decedent's gross estate. See

also *Liebes* v. *Commissioner*, 63 F. (2d) 870, 873 (C. C. A. 9th).

Accordingly, the *Chase National Bank* case, when considered together with *Reinecke* v. *Northern Trust Co.*, is further evidence that this Court did not consider the *Frick* case as holding that it would be retroactive taxation in every case to include policies taken out before the enactment of the 1918 Act. We submit, therefore, that the *Frick* case is not categorically determinative of the present controversy merely because the policies herein were taken out before the 1918 Act, and that it is necessary to examine the characteristics of these policies to determine whether the statute would in fact operate retroactively if applied.

Reference to the record in the *Frick* case will disclose, it is true, that three of the policies involved therein had been assigned by the insured reserving the right to revoke the assignments, a power comparable to the power to change the beneficiary, and that in several other policies, the beneficiaries' interests were contingent. But the Government did not make any argument based on that power of revocation or the defeasible aspects of the beneficiaries' interests, nor did the Court consider or even allude to them in its opinion. Under those circumstances, the decision cannot be regarded as having passed on the effect of such elements. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14. Those circumstances, when considered along with the

Chase National Bank case, *Reinecke* v. *Northern Trust Co.*, and the denial of certiorari in the *Grandin* case, would seem to indicate that the issue herein is not foreclosed by the *Frick* case.

B

SECTION 402 (F) DOES NOT OPERATE RETROACTIVELY AS TO THE POLICIES HEREIN

Transactions initiated before the effective date of a statute are frequently considered as completed only at the decedent's death occurring after the passage of the statute. A common type of such transaction is a transfer with reserved power to revoke, alter, or amend. It is only upon termination of such power that the transfers are regarded as complete. See *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Porter* v. *Commissioner*, 288 U. S. 436; *Gwinn* v. *Commissioner*, 287 U. S. 224. Cf. *Burnet* v. *Guggenheim*, 288 U. S. 280.

But a transfer with reserved powers to revoke, etc., is not the only kind of such transaction that may be incomplete until a later date. The creation of an estate by the entirety, for example, gives neither spouse any right of severance, revocation, etc. Yet the whole estate may be included in the gross estate of the spouse who created the tenancy, regardless of when it was created, because the surviving spouse's rights depended upon outliving the other, and became absolute for the first time at the other's death. *Third Nat. Bank & Trust Co.* v.

White, 287 U. S. 577, affirming *per curiam*, 58 F. (2d) 1085 (C. C. A. 1st), affirming *per curiam*, 45 F. (2d) 911 (Mass.); *Robinson* v. *Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, May 27, 1935, No. 871, 1934 Term. Cf. *Tyler* v. *United States*, 281 U. S. 497.

In this case, the four Berkshire policies were originally payable to the insured's executors, administrators, or assigns. By an instrument of assignment he purported to transfer his rights in those policies to his wife, but *specifically conditioned the assignment upon her survivorship.* It would seem plain that the wife acquired only a contingent interest in the policies. Entirely apart from the decedent's payment of premiums up to the time of his death, her rights depended on outliving her husband. His death was the indispensable event giving rise to, or at least enlarging, valuable property rights in the wife, not theretofore possessed or enjoyed. As this Court said in *Klein* v. *United States*, 283 U. S. 231, 234:

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying

> the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States,* 281 U. S. 497.

See also *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509; *Sargent* v. *White,* 50 F. (2d) 410 (C. C. A. 1st); *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.); *Univn Trust Co.* v. *United States,* 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547; *Commissioner* v. *Schwarz,* 74 F. (2d) 712 (C. C. A. 2d).[5]

As in those cases, the beneficiary's rights herein became absolute and indefeasible for the first time at the death of the insured. But that event occurred *after* the effective date of the 1918 Act.

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[5] See also *Helvering* v. *St. Louis Union Trust Co.*, No. 25, October Term, 1935; *Becker* v. *St. Louis Union Trust Co.*, No. 262, October Term, 1935. In both of the *St. Louis Union Trust Co.* cases, the transfers were made while an estate tax statute was in effect. They, therefore, do not raise questions of retroactivity, but are concerned chiefly with whether the transfers were of such character as to render them testamentary in effect. In the present case, the testamentary character of the transactions is supported not only by the contingent nature of the beneficiary's interests which were made indefeasible at the decedent's death, but also upon the characteristics of insurance which is inherently testamentary. Like gifts in contemplation of death, insurance may be properly assimilated to property of a decendent passing at his death. And the reason for such result depends, not upon the theory that property of the decendent passes at his death, but upon the theory that it is proper to include in his gross estate substitutes for testamentary dispositions. Thus, even if it should be held that the transfers in the *St. Louis Union Trust Co.* cases may not be included in the decedent's estates therein, such decision should not militate against our present position, if for no other reason, because insurance is *per se* testamentary.

And since the beneficiary became indefeasibly entitled to those proceeds for the first time at the decedent's death, there is no retroactive operation of the statute. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 175.

In the Connecticut policy, the decedent's wife was named as beneficiary, but her rights to the proceeds were specifically conditioned upon survivorship. Accordingly, the same reasoning which operated in the case of the four Berkshire policies to overcome the retroactivity objection is applicable here. But there is an additional feature in the Connecticut policy which we believe significant on this issue, if not dispositive thereof: namely, the right of cash surrender.

The policy contained the following provision (R. 43):

> And at the end of ten years from the date hereof [May 22, 1883], or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay a Cash Value therefor, to be ascertained by the Table of Cash Values endorsed hereon and hereby made a part of this Contract; such Cash Value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to, and this Policy to be first released and discharged to the satisfaction of said Company by King Upton, the Insured; and it is hereby agreed by all the parties hereto

> that such surrender, release, and discharge shall terminate this Policy, and any and every obligation whatsoever of said Company thereunder, to any and every person whatsoever:
>
> * * * * *

Thus, entirely apart from the contingency of survivorship, the insured had it within his power, for a period of thirty days from May 22, 1893, and a similar period at the end of each five years from that date, to wipe out all rights under that policy and to obtain for himself the cash value thereof.* Thus, while the beneficiary's interest may not have been wholly illusory, it was so uncertain and contingent that only at the insured's death were her rights made definite. Until the moment of death, the beneficiary's interest depended not only upon her surviving the insured, but also upon his failure to live until the end of the five year period, or if he should reach the end of the five year period, upon his failure to exercise his power to cancel the policy and receive the cash surrender value thereof.

The petitioners may point out, however, that the insured died February 27, 1921, and that the last five year period before his death ended May 22, 1918. They, therefore, seek to conclude that since

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*The decision in *Pennsylvania Company, etc., et al.* v. *Commissioner* (C. C. A. 3d), decided August 8, 1935, not yet officially reported but found in 353–A C. C. H., par. 9543, would seem to reach a contrary result, although it turned on local law. The Government is applying for certiorari in that case, No. 576.

the Revenue Act of 1918 became effective (February 25, 1919) after that period of revocation had expired and before another such period had arrived, the statute would operate retroactively if applied. But that contention is, we submit, open to two fatal objections.

First, even after the enactment of the 1918 Act, the beneficiary's interest was wholly contingent. The possibility that the insured might live until May 22, 1923, and then exercise his right of cash surrender was indeed a substantial obstacle to her rights. That obstacle was in existence while the 1918 Act was in effect. And the removal of that obstacle by his death certainly operated to render her interest indefeasible. That event, however, transpired after the enactment of the 1918 Act.[7]

[7] In this connection it is pertinent to observe that the decedent's power to surrender the policies and to pledge them as security for loans was relied upon by the Court in the *Chase National Bank* case, 278 U. S. 327, 335. However, the power of the insured in that case to obtain the cash surrender value of the policies or to borrow from the insurance company upon the security of the policies was specifically limited by the terms of those policies to be effective only after three full years' premiums had been paid. See Record in *Chase National Bank* case, pp. 22, 26, 30. This fact was also pointed out by the Government. See Government's brief, p. 8. But the policies in that case were taken out on September 13, 1922, whereas the insured died on April 10, 1924, before the third year premiums had even become due. In short, the power of surrender and the borrowing power had not yet become operative at the time of his death, and are thus analogous to the power of surrender in the Connecticut policy herein which had not become operative between the enactment of the 1918 Act and the insured's death.

Second, although the present controversy arises under the 1918 Act, Congress had passed an estate tax statute which became effective on September 8, 1916. That Act was amended by the Act of March 3, 1917, c. 159, 39 Stat. 1000, Title III, and further amended by the Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, Title IX. Thus, when the insured's power to call for cash surrender was last effective before his death, there was in existence a comprehensive estate tax law. The mere fact that the estate is being taxed under a later statute should be immaterial on the question of retroactivity. Cf. *Milliken* v. *United States*, 283 U. S. 15, 20 *et seq.* True, the earlier law had no specific provision regarding insurance. But it did present a comprehensive system of death taxes, and was sufficient to put one on notice that transactions testamentary in character, hitherto unprovided for, might be included in a later statute. It would, therefore, not be arbitrary and capricious to include such testamentary transactions in a later Act. Cf. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 379; *Cooper* v. *United States*, 280 U. S. 409.

II

So Construed, Section 402 (F) Is Constitutional

Preliminary considerations

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court held that it would be unconstitutional to include in a decedent's gross estate certain property trans-

ferred by her, not in contemplation of death, during her lifetime and before the enactment of the pertinent statute, where the transferees' interests became indefeasibly vested at the time of the transfer.

It would seem that there were two independent theories implicit in the Court's decision. *First,* that it is improper to include in a decedent's estate transfers that are not testamentary in character. As the Court said (p. 540):

> But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. * * *

The inference is that, entirely apart from the issue of retroactivity, the transfer could not be included because it was not testamentary. In a word, had the transfer even been made *after* the enactment of the statute, it could still not have been subject to the estate tax law. *Second,* that the transfers could not be included because they were made before the effective date of the statute, and that it would be unconstitutional to apply the statute retroactively.*

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* The gift (deed) of the two residences was made on May 18, 1917. 274 U. S. 531, 533. But that date was after the enactment of the first Federal estate tax statute. It would seem, therefore, that under this Court's later decision in *Milliken* v. *United States*, 283 U. S. 15, the objection of retroactivity would be inapplicable at least as to that transfer.

It is in the light of both these objections that we propose to consider the present case.

A

LIFE INSURANCE IS INHERENTLY TESTAMENTARY IN CHARACTER. THE POLICIES HEREIN ARE PARTICULARLY SO BECAUSE OF THE CONTINGENT CHARACTER OF THE BENEFICIARIES' INTERESTS, AND IT IS THEREFORE APPROPRIATE TO INCLUDE THE PROCEEDS THEREOF IN THE INSURED'S GROSS ESTATE.

Reserving for the moment the question of retroactivity (i. e., assuming that the policies were taken out after the effective date of the statute), we submit that this case is not subject to the first objection in *Nichols* v. *Coolidge*. The 1917 conveyance in *Nichols* v. *Coolidge* was an *inter vivos* transaction, vesting immediate indefeasible rights in the transferees. As pointed out by the Court, it bore no reasonable relationship to property passing at death.

In this case we are dealing with life insurance policies taken out by the insured, who paid all the premiums thereon until the time of his death. It has always been the general and popular conception that life insurance is property which the insured leaves behind when he dies. In England this has been recognized for many years. As early as the Succession Duty Act of 1853, proceeds of life insurance, where the insured has paid the premiums, have been included in the measure of death taxes. See Hanson, Death Duties, 6th Ed., 1915, p. 629. This concept was continued in the English Finance

Act of 1894. See Hanson, *ibid.*, at pp. 82, 105. Cf. *Attorney-General* v. *Pearson*, [1924] 2 K. B. 375; *Attorney-General* v. *Dobree*, [1900] 1 Q. B. 442.

In enacting Section 402 (f) of the 1918 Act, Congress has also recognized that life insurance is by its very nature testamentary in character. The report of the House Committee on Ways and Means specifically declares (H. Rep. No. 767, 65th Cong., 2d Sess., p. 22):

> The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the Committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum.

Like gifts made in contemplation of death, life insurance is a substitute for a testamentary gift, and may therefore be properly assimilated to the estate of a decedent passing at his death. Gifts made in contemplation of death need not be revocable,* to justify including them in the gross estate. They are included because they are essentially testamentary in nature. Cf. *United States* v. *Wells*, 283 U. S. 102. Similarly, we submit, life insurance is so definitely linked up with testamentary transfers, that it is proper to include policies of life insurance in the insured's gross estate, entirely apart from rights of cash surrender, contingent character of specific beneficiary's interests, power to change beneficiary, etc. Cf. *Burnet* v. *Wells*, 289 U. S. 670.

But even if it were necessary to search for further justifications other than the inherent characteristics of insurance, the policies herein may properly be included in the decedent's estate. For here the beneficiary's interests were so incomplete

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* In the case of ordinary *inter vivos* transfers, powers of revocation, reserved interests in the grantor, etc., may be necessary in order to render the transfer testamentary in character. Thus, in *Reinecke* v. *Northern Trust Co.*, *supra*, the power of revocation in the "two trusts" rendered otherwise non-testamentary transfers into ones that could be included in the grantor's gross estate. But gifts made in contemplation of death are *per se* testamentary and require no such additional characteristics to be assimilated to transfers at death. And we say the life insurance taken out by the insured and maintained by him until death is similarly *per se* testamentary.

during the insured's lifetime, that the removal of those contingencies alone by the insured's death is sufficient to characterize these transactions as testamentary. Certainly when the effect of these contingencies is considered together with the basic nature of life insurance, we believe that this case meets the first requirement stated in *Nichols* v. *Coolidge*, namely, that a transaction must have some reasonable connection with property passing at death in order to be employed in the measure of an estate tax.

II

AS TO RETROACTIVITY

The objection here is based upon the fact that the policies were taken out before the effective date of the first Federal estate tax statute. But the same reasons that we have advanced (I, B, *supra*) to remove this case from the scope of *Lewellyn* v. *Frick*, operate here also to overcome the constitutional objection based upon alleged retroactivity. In short, the beneficiary's rights became indefeasible for the first time at the insured's death, and that event occurred *after* the effective date of the statute. The statute therefore does not operate retroactively.[10]

CONCLUSION

The court below properly held that the proceeds of the four Berkshire policies and the Connecticut

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[10]A similar objection as to retroactivity is raised in *Industrial Trust Co.* v. *United States*, No. 213, October Term, 1935. The Government's brief in that case contains a further discussion of the constitutional aspects of this issue.

policy must be included in the insured's gross estate. Its decision should be affirmed.

Respectfully submitted.

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